Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1999

AMERICAN MOTORISTS INSURANCE COMPANY,

Petitioner,

v.

MONTROSE CHEMICAL CORPORATION OF CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether trial court orders that (a) purport to vitiate a litigant's attorney-client privilege on grounds of "fraud," (b) require the litigant to provide its adversary with all past and future attorney-client communications in connection with pending appeals that are directed to the foundations of the "fraud" order, and (c) refuse any stay of the "fraud" order pending the resolution of such appeals, deny the litigant due process of law and its rights to counsel and to access to the courts under the United States Constitution.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption of this petition identifies all parties in the Supreme Court of the State of California. Petitioner American Motorists Insurance Company has one parent corporation, Lumbermens Mutual Casualty Company, and two nonwholly owned subsidiary corporations, BBG Associates, Inc. and KAAL PGA Sales, Inc.

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PETITION FOR A WRIT OF CERTIORARI

American Motorists Insurance Company ("AMICO") respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of California in this case.

OPINIONS BELOW

The order of the Supreme Court of California is unpublished and reprinted in the appendix hereto ("Pet. App.") beginning at Pet. App. 1a. The order of the Superior Court for Los Angeles County requiring that AMICO produce all past and future attorney-client privileged documents, including all communications between AMICO and its counsel, is unpublished and reprinted here at Pet. App. 6a. The order entered by the Court of Appeal, Second Appellate District, Division

Seven, denying AMICO's Petition for a Peremptory Writ of Mandate or Other Appropriate Relief is unpublished and reprinted here at Pet. App. 2a. The Superior Court's order refusing to stay enforcement of the discovery ruling pending disposition of ongoing related appeals is unpublished and reprinted here at Pet. App. 12a.

JURISDICTION

The judgment of the Supreme Court of California was entered on April 21, 1999, Pet. App. at 1a, and a timely petition for a writ of certiorari is being filed within 90 days of that order. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides in relevant part: "No person shall *** be deprived of life, liberty, or property, without due process of law." The Fourteenth Amendment to the U.S. Constitution provides in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law ***."

STATEMENT OF THE CASE

A. Introduction

This case presents important issues concerning the viability of the attorney-client privilege for defendants in insurance coverage and other civil cases where "bad faith" claims are recognized who risk waiving the privilege merely by asserting an affirmative defense. AMICO is a liability insurer which is the subject of suits claiming insurance coverage and damages for "bad faith." On December 11, 1998, the Superior Court for Los Angeles County, per the Honorable Joseph R. Kalin, held that Montrose had made out a *prima facie* case that AMICO, in the "bad faith" action and related coverage actions,[1] had

1. The "bad faith" case out of which the trial court's discovery order arose is captioned *Montrose Chemical Corp. of California v. American Motorists Insurance Company, et al.*, Case No. BC 130486 ("Montrose v. AMICO"). There are four related insurance coverage cases, also pending in Los Angeles County Superior Court: *Montrose Chemical Corp. of Califor-*

fraudulently advanced a meritless defense that Montrose is not insured under certain AMICO policies – *i.e.*, that AMICO groundlessly contended that it did not insure Montrose while knowing that, in fact, it did. The trial court also held that Montrose had made out a *prima facie* case that AMICO had employed its counsel to further this allegedly fraudulent "named insured" position. On these "premises," Judge Kalin ruled that AMICO had waived any right to maintain a privilege for attorney-client communications relating to the "named insured" issue.

Prior to seeking appellate review of the December 11 Order, AMICO asked Judge Kalin to stay that order pending the resolution of two ongoing appeals in the related *Canadian II* and *Canadian III* coverage litigations.[2] Each of these appeals presents the question whether Judge Kalin erred in reaching the fundamental conclusion that underpins his December 11 Order – namely, that AMICO's "named insured" defense lacks merit. Assuming AMICO prevails on these appeals, as it believes it will, and Judge Kalin's summary adjudications of the "named insured" issue are reversed, the Court of Appeal will have determined that the very evidence that Judge Kalin deemed sufficient as a matter of law to establish that AMICO insures Montrose would, in fact, permit a jury to reach the opposite conclusion. Such a determination would wholly undermine Judge Kalin's December 11 Order since it would be completely incongruous to hold that the evi-

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nia v. Canadian Universal Ins. Co., et al., Case No. C 594148 (consolidated with Case No. C 597389) ("Canadian I"); *Montrose Chemical Corp. of California v. Canadian Universal Ins. Co., et al.*, Case No. BC 005158 ("Canadian II"); *Montrose Chemical Corp. of California v. The Travelers Indemnity Co., et al.*, Case No. BC 077158 ("Canadian III"); and *Montrose Chemical Corp. of California v. The Travelers Indemnity Co., et al.*, Case No. BC 164315 ("Canadian IV").

2. The two appeals before the Court of Appeal, Second Appellate District, are styled *Montrose Chemical Corp. of California v. American Motorists Ins. Co.*, 2nd Civil Case No. B122750 (appeal from the Superior Court for Los Angeles County, Case No. BC005158 (*Canadian II*), and *Montrose Chemical Corp. of California v. American Motorists Ins. Co.*, 2nd Civil Case No. B122893 (appeal from the Superior Court for Los Angeles County, Case No. BC077158 (*Canadian III*).

dence supports the conclusion that AMICO "knew" something to be a fact that a jury could properly determine *not* to be a fact.

Notwithstanding, on January 13, 1999, Judge Kalin denied AMICO's motion to stay the December 11 Order pending resolution of the *Canadian II* and *Canadian III* appeals. Judge Kalin's ruling thus operates to deprive AMICO of its right to communicate confidentially with counsel in seeking reversal of Judge Kalin's "named insured" decisions. At a conference on December 15, 1998, Judge Kalin confirmed that the December 11 Order contemplates that AMICO share all of its attorney-client privileged communications concerning the principal issue involved in the ongoing appeals — and the issue upon which the "fraud" order is founded — with Montrose, AMICO's adversary, *while the appeals are pending*. This petition seeks certiorari review not of the propriety of the trial court's ruling itself, but rather of the procedural means by which the court enforced its ruling in a manner calculated to deprive AMICO of the benefit of counsel in prosecuting pivotal appeals.

B. Course of Proceedings Below

This action, and the related coverage actions, involve as to AMICO claims arising out of or that necessarily derive from Montrose's contention that it is a "named insured" under AMICO Policies. Three of the actions — the "bad faith" suit and the *Canadian II* and *Canadian III* coverage cases — are pending before Judge Kalin. A brief account of the proceedings before him on the "named insured" issue is in order.

AMICO issued certain general liability insurance policies to the former Stauffer Chemical Company covering the period January 1, 1969 to March 1, 1971 ("the AMICO Policies"). The AMICO Policies define the "named insured" to be Stauffer and its "owned or controlled subsidiaries, affiliated companies or other corporations now existing or hereafter created." At relevant times, Stauffer and another company, Chris-Craft Industries, Inc. each held 50% of Montrose's shares, but Stauffer has never wholly owned Montrose. At the outset of the litigation regarding AMICO's disputed coverage

obligations, AMICO raised the affirmative defense that Montrose is not insured under the foregoing definition.

In one of the related coverage litigations, *Canadian III,* Judge Kalin ruled on November 30, 1995, that Montrose was a "named insured" under the AMICO Policies based upon the "named insured" definition and Stauffer's 50% share ownership. See Pet. App. at 33a. In an unpublished opinion (which is the law of the case with regard to this dispute), the Court of Appeal noted that the Supreme Court of California had rejected Montrose's "policy language + 50% share ownership" argument in its landmark decision in *Montrose Chemical Corp. v. Superior Court,* 6 Cal. 4th 287, 294 n.3, 861 P.2d 1153, 1156 n.3, 24 Cal. Rptr. 2d 467 (1993); the question of whether AMICO insures Montrose is a question of *fact*; and Judge Kalin's summary adjudication in favor of Montrose had been erroneously granted in view of "triable issues of material fact." Pet. App. at 30a.

On remand, Judge Kalin entertained, and once again granted, a "renewed" motion by Montrose seeking summary adjudication of the "named insured" issue. The "renewed" motion was filed as a "consolidated" motion in both *Canadian II* and *Canadian III,* and Judge Kalin's October 28, 1997 decision on that motion, see Pet. App. at 23a, soon became the subject of appeals in those cases. *See supra* at n.2. (Judge Kalin's order became appealable because he subsequently granted Montrose permanent injunctive relief based upon his "named insured" ruling.) Both of AMICO's appeals are currently pending before the Court of Appeal.

On August 17, 1998, Montrose filed a Supplemental Motion to Compel Production of AMICO's Privileged and Non-Privileged Documents and Testimony Relating to the Attorney-Client Privilege ("Fraud Motion") in an effort to obtain AMICO's attorney-client communications relating to the "named insured" issue. AMICO filed its Opposition to Montrose's Fraud Motion on September 16, 1998, and Montrose filed its Reply Brief (and additional accompanying exhibits) on September 29, 1998. With permission from the trial court, AMICO filed a Sur-Reply Brief in Opposition to

Montrose's further exhibits and argument on October 19, 1998. Montrose's Brief in Reply to AMICO's Sur-Reply was filed three days later.

Montrose's motion came before Judge Kalin on October 27, October 28 and November 4, 1998. The trial court refused repeated requests by AMICO to examine Montrose's counsel — who served as Montrose's affiant and witness — in order to challenge Montrose's submissions.

C. The Decisions Below

On November 24, 1998, the trial court issued a minute order granting Montrose's motion to compel production of AMICO's privileged and non-privileged documents, *see* Pet. App. at 3a, and a written order was entered on December 11, 1998. *See* Pet. App. at 6a The December 11 Order requires that AMICO produce to Judge Kalin all attorney-client privileged documents, including all communications between or among AMICO and its counsel, "in any way relating to the 'named insured' issue." The Order provides that Judge Kalin will review all such documents to ensure that no *other* privileges attach, and will then turn them over to Montrose. *See* Pet. App. at pp. 7a, 9-10a; *see also id.* at 15-16a (Transcript of Proceedings 11/24/98) at 49-50 [WR-20731 to 20732] (providing for *in camera* review for work product and other privileges).

At a hearing on December 15, 1998, AMICO objected to the December 11 Order (which the court had entered before AMICO had an opportunity to file objections) on the grounds, among others, that it required AMICO to divulge to Montrose ongoing attorney-client communications in connection with the pending appeals in *Canadian II* and *Canadian III*. Judge Kalin responded:

> See, that's another issue now. I mean, if — that's the continuing bad faith that Montrose is alleging, that years ago you should have followed the court orders, whatever they were at that time and the duty to defend it, *so any appeals on those issues right now would be something that would be producible* *** I don't intend to have discovery of trial preparation [in the "bad faith" case] but I would agree that *if*

> *Montrose is alleging ongoing bad faith that — I'm not cutting that issue off under any circumstances,* counsel. So I'm going to leave the order the way it is.

Judge Kalin later added:

> . . . You've got an issue of trial preparation and you've got an issue of bad faith. . . . *So isn't the continuation of the appeal a possible issue of bad faith?* Pet. App. at 18a, 19a, and 21a.

AMICO filed a motion on January 6, 1999, seeking a stay of the December 11 Order pending resolution of the related appeals in *Canadian II* and *Canadian III*. By order dated January 15, 1999, the trial court denied AMICO's motion. Pet. App. at 12a.

The December 11 Order provided that AMICO could pursue a writ of mandate within 40 days of its entry. AMICO timely filed such a petition on January 20, 1999. The Court of Appeal denied this writ petition on February 19, 1999. Pet. App. at 2a. On March 1, 1999, AMICO filed a petition for review of the Court of Appeal's order in the Supreme Court of California. The California Supreme Court denied the petition on April 21, 1999.

D. Jurisdiction

Although Petitioner contends that this Court's jurisdiction is properly invoked under 28 U.S.C. § 1257, this issue was disputed by respondent in proceedings below in which it urged the lower court not to stay implementation of its order pending review by this Court. Petitioners will, therefore, briefly address the issue. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 474-82 (1975), this Court delineated the circumstances in which it would review a ruling by the highest court of a State notwithstanding the pendency of further proceedings in the lower state courts. The Court found "at least four categories of such cases in which [it] has treated the decision on [a] federal issue as a final judgment for the purposes of 28 U.S.C.

§ 1257 and has taken jurisdiction without awaiting the completion of additional proceedings anticipated in the lower state courts." *Id.* at 477.[3]

The instant case is one "where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case."[4] *Id.* at 481. As this Court explained, in such cases, if the party seeking review ultimately prevails on the merits, the federal issue will be mooted; whereas if he loses on the merits, the governing state law would prevent him from again presenting his federal claims for review. *Id.* "The Court has taken jurisdiction in these circumstances prior to completion of the case in the state courts." *Id.* Since the California Supreme Court issued a final judgment denying review of the trial court's December 11 Order, petitioner cannot seek further review of the federal issue at stake in any further state appel-

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3. The Court's rationale for granting review in such circumstances is that

> in most, if not all, of the cases in these categories, these additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date, and immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice,' (citation omitted), as well as precipitate interference with state litigation.

Id. at 477.

4. The remaining three categories identified by this Court in *Cox Broadcasting* are: (1) "cases in which there are further proceedings — even entire trials — yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of the further proceedings preordained"; (2) cases "in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings"; and (3) "situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come." *Cox Broadcasting*, 420 U.S. at 479-82.

late proceedings. Of utmost importance, however, is that *regardless* of whether petitioner prevails or loses in the Court of Appeals on the "bad faith" issue — *i.e.*, the Court determines that AMICO's "named insured" defense was or was not asserted in bad faith — the federal issue regarding deprivation of a civil defendant's right to counsel and access to the courts for asserting certain affirmative defenses will necessarily be mooted because of the trial court's order that AMICO be *immediately* deprived of such rights while the appeals are pending. Moreover, certiorari review of this federal issue will in no manner interfere with future proceedings in the trial court. Accordingly, this case fits squarely within that category of cases specifically prescribed as appropriate for this Court's review.

REASONS FOR GRANTING THE PETITION

This case presents a straightforward issue of genuine procedural and constitutional importance: whether civil defendants that assert affirmative defenses, particularly in areas of the law where "bad faith" claims are recognized, will be forced thereby to forfeit their fundamental Due Process rights to counsel and access to the courts solely for having raised the defense. The trial court's December 11 Order (hereinafter "Order") vitiating AMICO's attorney-client privilege with respect to the "named insured" issue is based on a purported *prima facie* showing that AMICO fraudulently advanced the meritless defense that Montrose is not insured under the relevant AMICO policies. By refusing to stay the Order pending the appeals, the trial court seeks to eviscerate AMICO's access to counsel *before* final resolution of the very issue upon which AMICO's right to counsel depends. Moreover, by forcing AMICO to share all past and future communications with its adversary while the appeals are pending, AMICO is denied any confidential access to its counsel in connection with ongoing appeals that attack the very foundation of the trial court's ruling. This kind of ruling, if allowed to stand, not only deprives defendants of their right to counsel after asserting an affirmative defense, but effectively deters litigants from even raising such defenses for fear that a "bad faith" challenge

might cost them confidential communications with counsel. Given the nationwide increase of bad-faith litigation against insurers, such a chill on defendants' rights to assert affirmative defenses has far-reaching ramifications well beyond the facts of this case.

The trial court Order also operates to deprive AMICO of due process of law by improperly infringing upon its right of access to the courts. The trial court sought to implement its Order in a way deliberately calculated to interfere with AMICO's unquestioned right to challenge the correctness of the "named insured" rulings on which the Order is founded and to insulate those orders from appellate scrutiny. As the court itself conceded, the Order seeks to deny AMICO any past or future confidential access to its counsel notwithstanding the pendency of ongoing appeals that attack the very basis for its decision. AMICO is thus forced to choose between prosecuting the appeals without the benefit of proper counsel or abandoning the appeals and allowing the errors in *Canadian II, Canadian III* and the "bad faith" issue itself to stand uncorrected. This kind of whipsaw, if permitted, would be an enormously effective and convenient device for chilling the rights of litigants to challenge trial court error. No trial court has the power, under the federal constitution and laws, thus to intimidate a litigant in the exercise of its fundamental rights or to inhibit lawful challenges to the court's decisions. Accordingly, this Court's review is necessary to rectify the patent violation of AMICO's constitutional rights to counsel and access to the courts, and to prevent future abuses of trial court discretion in the "bad faith" litigation mounting nationwide.

REVIEW IS NECESSARY TO PRESERVE CIVIL DEFENDANTS' RIGHT TO ASSERT AFFIRMATIVE DEFENSES WITHOUT FORFEITING PRIVILEGED COMMUNICATIONS WITH COUNSEL OR ACCESS TO APPELLATE REVIEW.

1. A Ruling Which Deprives Litigants of Confidential Communications With Counsel For Raising An Affirmative Defense Unlawfully Interferes With Their Right to Counsel.

The Due Process Clauses of the United States Constitution[5] guarantee the right to retained counsel in a civil action. More than 40 years ago this Court affirmed this fundamental right in *Powell v. Alabama,* 287 U.S. 45, 69 (1932):

> If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

See also, id. at 68 ("What, then does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right.")[6]

Corporations have no less a right to counsel than individuals. Indeed, the constitutional right of counsel is of particular significance where a corporation is involved.

> Corporations may not assert 'purely personal' rights but, no less than natural persons, they are entitled to due process and the equal protection of the laws. . . . In fact, denying a corporation the right to retain counsel may be tantamount to stripping the corporation of its right to defend itself in court, for 'it is established that a corporation, which is an artificial entity that can only act through agents, cannot proceed pro se.'

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5. U.S. Const., Amends. V and XIV.

6. The Circuit Courts of Appeal are, of course, in accord. *American Airways Charters, Inc. v. Regan,* 746 F.2d 865, 873 (D.C. Cir. 1984) ("The right to the advice and assistance of retained counsel in civil litigation is implicit in the concept of due process"); *id.*("While private parties must ordinarily pay their own legal fees, they have an undeniable right to retain counsel to ascertain their legal rights") (citation omitted); *Mosley v. St. Louis Southwestern Railway,* 634 F.2d 942, 945 (5th Cir. 1981) ("This right [to counsel] inheres in the very notion of an adversarial system of justice, and is indispensable to the effective protection of individual rights."); *Cavallo v. Star Enterprise,* 1998 U.S. App. LEXIS 15114, at *9 (4th Cir.1998) ("Although the right to retain counsel in the civil context is not coextensive with that of a criminal defendant, a civil litigant does have a constitutional right to retain counsel.").

American Airways Charters, Inc. v. Regan, 746 F.2d 865, 873 n.14 (D.C. Cir. 1984) (*quoting Jones v. Niagara Frontier Transp. Auth.,* 722 F.2d 20, 22 (2d Cir. 1983)).

A corporation's right to counsel necessarily embodies the right to communicate confidentially with counsel. As courts have long recognized, the right to counsel would be meaningless if a party could enjoy it only at the cost of disclosing to the court and its litigation adversary on an ongoing basis the substance of all communications with its retained counsel. *See Baird v. Koerner,* 279 F.2d 623, 629-30 (9th Cir. 1983) ("The purpose of the attorney-client privilege is to protect every person's right to confide in counsel free from apprehension of disclosure of confidential communications."); *In re Cherney,* 898 F.2d 565, 569 (7th Cir. 1990) ("A rule that would permit the government to compel an attorney to disclose her client's identity under circumstances that would reveal the client's confidential communications would have serious consequences for our system of government."); and *Chase Manhattan Bank, N.A. v. Turner & Newall, PLC,* 964 F.2d 159, 165 (2d Cir. 1992) ("In the case of the attorney-client privilege, [], a litigant claiming the privilege would probably prefer almost anyone other than adversary counsel to review the documents in question."). Moreover, as the Ninth Circuit Court of Appeals has observed, where the state has recognized a right to counsel, "there exists a point at which state interference with the presumptive confidentiality of such [attorney-client] communications might implicate constitutional due process." *Tahoe Regional Planning Agency v. McKay,* 769 F.2d 534, 539 n.8 (9th Cir. 1985).

The trial court's orders in this case effectively deny AMICO these constitutional guarantees. The trial court's Order vitiating AMICO's attorney-client privilege with respect to the "named insured" issue is based on a *prima facie* showing that AMICO fraudulently advanced a meritless defense that Montrose is not insured under certain AMICO policies. Pending resolution of this issue by the Court of Appeals, however, there has been no final determination that AMICO's asserted defense is, in fact, invalid. Nor is there any final determination that AMICO knowingly raised the defense in disre-

gard of its objective baselessness. Notwithstanding the uncertainty of these issues, the trial court seeks immediately to eviscerate AMICO's attorney-client privilege as to all past communications on the "named insured" issue. Even more critically, it seeks to deprive AMICO of its right to communicate confidentially with counsel *on an ongoing basis as to future proceedings* which challenge the correctness of the very ruling upon which AMICO's supposed "waiver" depends. The court's Order thus guarantees that AMICO's privilege rights will be irretrievably lost, even if the Court of Appeals subsequently determines that the asserted defense is valid. In essence, the Order effectively penalizes AMICO *merely for having raised the defense* regardless of its potential validity.

This kind of ruling, if permitted to stand, will provide a serious disincentive to asserting affirmative defenses absent an absolute certainty of their success. Faced with the threat of a "bad faith" challenge, litigants will inevitably forego asserting potential defenses rather than risk disclosure of confidential communications to their opponents. Such a result not only undermines the ability of attorneys to zealously represent their clients, but directly contravenes the spirit of the adversarial process which encourages litigants to advance all arguments reasonably likely to succeed. Indeed, affirmative defenses are required to be raised at the outset of litigation — a stage when parties cannot fully ascertain the merits of their position without further factual discovery. *See* Fed. Rule Civ Pro. 12(b) ("Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required. . . .") Requiring defendants to choose between asserting defenses that may deprive them of the benefit of counsel or refrain from raising certain affirmative defenses assures that vigorous defense of civil lawsuits will be compromised.

Arguably, proof that a defense was asserted in bad faith can most easily be obtained from disclosure of privileged documents. However, a trial court ought not be permitted to deprive litigants of the benefit of counsel pending appeal of a *prima facie* determination of bad faith unless the defense is so

improper that *merely raising the defense* is itself so unscrupulous as to warrant loss of the privilege. This is particularly true where the privilege at stake is so vital to fair and effective representation. Indeed, this Court has repeatedly recognized the attorney-client privilege as "the oldest of the privileges for confidential communications known to the common law" founded upon "the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *see also id.* ("The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out."). By allowing the trial court's ruling to stand, plaintiffs are afforded a powerful coercive device for defeating certain affirmative defenses simply by resorting to the argument that a defendant acted in bad faith even to raise a particular defense. This result severely inhibits defendants' ability to defend against lawsuits by removing a principle means of disproving allegations, and is thus itself a serious violation of defendants' due process rights.

Moreover, such a result has enormous practical consequences given the nationwide proliferation of "bad faith" insurance litigation. Last month, the California state legislature approved legislation which dramatically expands plaintiffs' abilities to file bad faith lawsuits against insurers.[7] *See*

7. The legislation at issue reinstates a legal doctrine known as "Royal Globe" that the state Supreme Court rejected more than a decade ago because of its dramatic expansion of bad faith lawsuits against insurers. "Royal Globe" – named after the insurance company that figured in the case – was established in March 1979 by the Court in a decision which allowed for the first time a plaintiff to file a bad faith lawsuit against a defendant's insurer over legitimate claims that were delayed or denied. California insurers predict that the legislation will "open the floodgates to contingency-fee-driven litigation that [will] boost the costs of premiums and claims," *see The National Underwriter Company National Underwriter, Property & Casualty/Risk & Benefits Management Edition*, "California Senate Votes To Reinstate Royal Globe," (June 14, 1999), leading to an estimated

The National Underwriter Company National Underwriter, Property & Casualty/Risk & Benefits Management Edition, "California Senate Votes To Reinstate Royal Globe," (June 14, 1999). Similarly, recent legislation now allows accident victims to pursue "third party bad faith" lawsuits against insurance companies of other persons involved in accidents. *See Insurance Accounting,* "N.M.: Claims Bill Criticized," (February 22, 1999).[8] Court decisions also reflect the growing trend towards expansion of bad faith litigation. Last month, the Rhode Island Supreme Court embarked in a major departure from established state law by adopting a "strict liability" standard in bad faith claims settlement cases, *see Asermely v. Allstate Ins. Co.,* 728 A.2d 461 (R.I. 1999); while the Massachusetts U.S. Bankruptcy Court, in a case of first impression regarding an attempt to nullify third-party liability as part of a policy-holder's bankruptcy proceedings, issued a decision "reaffirm[ing] that insurers can be independently liable to third parties for bad faith." *See In re Salem Suede, Inc.,* 219 B.R. 922 (Bankr. D.Mass. 1998).

Against this background, a ruling which erodes insurers' ability to defend against "bad faith" lawsuits virtually ensures an even greater flood of litigation against insurance companies forced to choose between confidential access to counsel and basic affirmative defenses (such as that the claimed insured is a stranger to the insurance policy at issue). Moreover, as insurers increasingly seek ways to compensate for increased exposure to liability, *i.e.* higher premiums, rulings which deprive them of the fair opportunity to litigate such claims guarantee that consumers will ultimately suffer the consequences. Given

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14.5 percent cost increase (approximately $1.5 billion) for all types of liability insurance. *See The National Underwriter Company National Underwriter, Property & Casualty/Risk & Benefits Management Edition,* "California Insurers Prepared To Fight 'Royal Globe" Return," (May 24, 1999).

8. *See also Federal & State Insurance Week,* "New York Bill Would Allow Bad-Faith Claims" (May 4, 1998) (discussing recent legislation in New York State Senate permitting expansion of lawsuits against insurers for bad faith settlement of claims); *Timothy Benn Publishing Limited Post Magazine,* "Guest Comment; All in Bad Faith," (May 13, 1999) ("The American insurance industry has been dominated by bad faith litigation for over a decade.")

the broad implications of the trial court's ruling, the due process issues presented by this petition are worthy of this Court's review.

2. A Ruling Which Deprives Litigants Of Access To Counsel While Appellate Review Is Pending Unlawfully Obstructs Their Right Of Access To The Courts.

The Due Process Clauses of the Constitution also ensure that citizens will have meaningful access to the courts, a right inextricably related to the right to counsel:

> Appellants' interest in speaking freely with their attorneys is interwoven with their right to effective assistance of counsel. 'Meaningful access to the courts is a fundamental right of citizenship in this country.' *Porter v. Califano,* 592 F.2d 770, 780 (5th Cir. 1979). Indeed, all other rights would be illusory without it. *Adams v. Carlson,* 488 F.2d 619, 630 (7th Cir. 1973). Thus, while private parties must ordinarily pay their own legal fees, they have an undeniable right to retain counsel to ascertain their legal rights. *See Potashnick v. Port City Construction Co.*, 609 F.2d 1101, 1117-19 (5th Cir.), *cert. denied,* 449 U.S. 820 (1980).
>
> Restrictions on speech between attorneys and their clients directly undermine the ability of attorneys to offer sound legal advice. As the common law has long recognized, the right to confer with counsel would be hollow if those consulting counsel could not speak freely about their legal problems.

Martin v. Lauer, 686 F.2d 24, 32 (D.C. Cir. 1982)(footnotes omitted).[9]

The trial court's attempt to enforce its Order while the *Canadian II* and *Canadian III* appeals are pending has the purpose and effect of denying AMICO this right of access and leaves this Court faced with a grave systemic challenge. The

---

9. *See also* Laurence H. Tribe, *American Constitutional Law*, § 10-18 at 757 (2d ed. 1988) ("A right to meaningful access to court may also be implicated by denials of adequate legal representation, and even by denials of the legal representation of one's choice.").

trial court sought to interfere with ongoing appeals from its prior rulings in the coverage actions in a way contrived to disrupt the appellate process and, potentially, insulate those rulings from proper appellate consideration. AMICO is thus forced to choose between prosecuting the appeals without confidential access to counsel or abandoning the appeals and allowing the errors in *Canadian II, Canadian III* and the "bad faith" case itself to stand uncorrected. A trial court cannot, consistent with due process, condition continued exercise of AMICO's right to appeal rulings upon forfeiting its attorney-client privilege and the confidential advice and guidance of counsel in those appeals. This is especially true where the rulings on appeal form the very foundation for conclusion that privilege has been "waived."

Moreover, it is not for a trial court to attempt to trump a Court of Appeal or to frustrate the appellate process. A civil case will often involve, on a particular issue, a winner, a loser and an appeal. To permit a trial court, while such an appeal is pending, to rule that the losing party's position is *prima facie* "fraudulent" and require that it immediately forego its privilege during the pendency of its appeal would prove a tremendously effective device for chilling the loser's constitutional and statutory rights to challenge trial court error. It would give a judge a powerful tool to intimidate litigants and to inhibit lawful challenges to his decisions. No trial court has the power, under the constitution, thus to intimidate a litigant in the exercise of its fundamental rights or to inhibit lawful challenges to the court's decisions.

The trial court's orders thus present not only serious constitutional errors, but serious questions of the proper reach of trial court authority in the judicial system. These questions are of concern to all litigants and to this Court, and thus review of these questions are in order.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully Submitted,

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Attorneys for Petitioner
American Motorists Insurance Company

July 20, 1999

APPENDIX

Second Appellate District, Division Seven,

No. B128862
S076904

SUPREME COURT
FILED
APR 21 1999
Robert Wandruff Clerk
DEPUTY

IN THE SUPREME COURT OF CALIFORNIA

AMERICAN MOTORISTS INSURANCE COMPANY,
Petitioner

v.

LOS ANGELES COUNTY SUPERIOR COURT,
Respondent

MONTROSE CHEMICAL CORPORATION OF CALIFORNIA,
Real Party In Interest

Petition for review DENIED.

GEORGE
Chief Justice

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

COURT OF APPEAL
- SECOND DISTRICT
FILED
FEB 19 1999
JOSEPH A. LANE Clerk

E. AMOS
Deputy Clerk

AMERICAN MOTORISTS INSURANCE COMPANY,	:	No. B128862
Petitioner,	:	(Super. Ct. No. BC130486)
v.	:	(Joseph R. Kalin, Judge)
SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,	:	
Respondent.	:	
MONTROSE CHEMICAL CORPORATION OF CALIFORNIA,	:	
Real Party in Interest.	:	

ORDER

THE COURT*:

The court has read and considered the petition for writ of mandate filed herein January 20, 1999, the opposition to the petition filed by the real party in interest January 25, 1999, and the reply thereto filed by petitioner February 10, 1999. The petition is denied.

*LILLIE, P.J.,

JOHNSON, J.,

WOOD, J.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

11/24/98	DEPT. 55
HONORABLE JOSEPH R. KALIN	E.T. ESPINOZA
Judge	*Deputy Clerk*
HONORABLE	ELECTRONIC RECORDING MONITOR
Judge Pro Tem	
G. PADILLA, *Assistant Clerk*	DOLMAN (VIDEO)
Deputy Sheriff	*Reporter*

BC130486

MONTROSE CHEMICAL CORP. OF CALIFORNIA
Plaintiff Counsel

NO APPEARANCES

vs.

AMERICAN MOTORISTS INSURANCE CO.
R/F 10/29/98
Defendant Counsel

r/t BC005158

NATURE OF PROCEEDINGS:

RULING ON SUBMITTED MATTER

The Court having taken MONTROSE'S MOTION TO COMPEL PRODUCTION OF AMERICAN MOTORISTS INSURANCE COMPANY'S PRIVILEGED AND NON-PRIVILEGED DOCUMENTS AND TESTIMONY RELATING TO THE "NAMED INSURED" ISSUE UNDER THE FRAUD EXCEPTION TO THE ATTORNEY PRIVILEGE under submission on November 4, 1998, now rules as follows:

Montrose's Motion to compel production of AMICIO'S named insured documents, privileged and non-privileged related documents and testimony is granted under the fraud exception to the attorney-client privilege. All such documents are to be submitted to the Court to be examined in camera. These documents are set out as items I through 6 on pages 49 and 50 of plaintiff's motion.

Montrose has established a prima facie showing that AMICO knew that Montrose was a named insured and has further shown that AMICO committed fraud in contending otherwise.

The *prima facie* showing is based on the following offered evidence by Montrose.

1. AMICO agreed to duplicate coverage provided by prior insurance carriers.

2. Prior insurers covered Montrose as a Stauffer related company under its general liability insurance this being conceded by AMICO.

3. AMICO policies defined "named insured" as Stauffer Chemical Company at all locations of the insured. This included owned or controlled subsidiaries or affliate companies or corporations now exisiting or hereinafter created.

4. AMICO covered Montrose's automobiles under the Stauffer coverage.

5. AMICO inspected Montrose facilities under Stauffer's policies.

6. Mr. John Noe of AMICO concluded after his review that Montrose was covered under the AMICO policies named insured provision under the Stauffer policies.

7. AMICO'S own documents refer to Montrose Chemical as a named insured.

8. AMICO'S premium calculations used Montrose loss, payroll, sales and automobile data in determining Stauffers premiums.

9. Montrose was not a "specific joint venture" excluded under the policies.

10. AMICO established substantial reserves on the Montrose claims.

11. AMICO provided documents to Montrose through its counsel that contradicted evidence in its files.

12. AMICO failed to disclose favorable coverage information to its insured.

13. A substantial number of documents have been identified during depositions and other forms of discovery but have not been provided by AMICO.

The ultimate determination of the above evidence offered by Montrose will be for the jury to decide. However, for purposes of discovery motions the Court can conclude that there are strong reasonable inferences of the above as being factual so as to constitute waiver of the attorney-client privilege.

A true copy of this minute order is sent to counsel via U.S. Mail this date as follows:

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Attorneys for Plaintiff
Montrose Chemical Corporation of California

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

MONTROSE CHEMICAL CORPORATION OF CALIFORNIA, a corporation, Plaintiff, v. AMERICAN MOTORISTS INSURANCE COMPANY, et al., Defendants. AND RELATED CROSS-ACTION.	: CASE NO. BC 130486 : ORDER GRANTING MONTROSE CHEMICAL CORPORATION OF CALIFORNIA'S MOTION TO COMPEL PRODUCTION OF AMERICAN MOTORISTS INSURANCE COMPANY'S PRIVILEGED AND NON-PRIVILEGED DOCUMENTS AND TESTIMONY UNDER FRAUD EXCEPTION TO ATTORNEY-CLIENT PRIVILEGE : DATE: NOVEMBER 4, 1998 : TIME: 8:15 A.M. : DEPT: 55 : JUDGE: HON. JOSEPH R. KALIN TRIAL DATE: MARCH 16, 1998 MOTION CUT-OFF: NONE DISCOVERY CUT-OFF: DEC. 15, 1998

Montrose Chemical Corporation of California's Motion to Compel Production of American Motorists Insurance Company's Privileged and Non-Privileged Documents under the Fraud Exception to the Attorney-Client Privilege, and matters related thereto, came on for hearing on October 27 and 28, 1998 and November 3 and 4, 1998. Montrose was represented by Kristine L. Wilkes of Latham & Watkins. American Motorists Insurance Company was represented by John C. Chesney of Drinker Biddle & Reath. This motion was initially noticed for hearing on September 1, 1998, and was twice continued to allow for thorough briefing and consideration. The Court has reviewed over two-hundred pages of briefing and over five-hundred exhibits. Based upon the briefing, exhibits and argument of counsel, the Court GRANTS Montrose's motion as set forth herein.

The Court having taken MONTROSE'S MOTION TO COMPEL PRODUCTION OF AMERICAN MOTORISTS INSURANCE COMPANY'S PRIVILEGED AND NON-PRIVILEGED DOCUMENTS AND TESTIMONY RELATING TO THE "NAMED INSURED" ISSUE UNDER THE FRAUD EXCEPTION TO THE ATTORNEY PRIVILEGE under submission on November 4, 1998, now rules as follows:

Montrose's Motion to compel production of AMICO's named insured documents' privileged and non-privileged related documents and testimony is granted under the fraud exception to the attorney-client privilege. All such documents are to be submitted to the Court to be examined *in camera*. These documents are set out as item 1 through 6 on pages 49 and 50 of plainmtiff's motion, and are as follows:

1. Communications between any AMICO agents, representatives or employees, including inside or outside counsel, relating to the "named insured" issue;[1]

---

1. "AMICO" includes Kemper, Lumbermens and any affiliated companies such as NATLSCO, as well as all inside and outside counsel, to extent AMICO has access to such donuments. Within forty days of entry of this Order, AMICO is to identify and documents within the scope of this Order which it is withholding on grounds that such document(s) is not within AMICO's custody or control.

2. Investigation documents, notes, reports or analyses relating to the "named insured" issue, including all Noe reports (unredacted) for all Stauffer claims and all documents reviewed by Mr. Noe in preparing his reports;

3. All underwriting documents relating to the "named insured" issue, including documents collected by the Environmental Claims Unit and notes taken by AMICO personnel regarding interviews with underwriters of the Stauffer account;

4. Claims file and payment records for all Stauffer and Montrose settled claims, including *Parker v. Stauffer,* the prior Henderson claim referenced in the Noe report.

5. Legible and complete copies of all AMICO loss runs, audit records and reports on the Stauffer policies, including but not limited to (a) records of any claims (property, automobile, liability, crime correspondence, business interruption or workers' compensation) paid by AMICO for Montrose claims (Henderson or Torrance); (2) records of any claims paid by AMICO for any of Stauffer's other 50% owned joint ventures, subsidiaries or affiliated companies; (3) any schedule or records relating to the location or key codes assigned to insured locations of Statffer operations; and (4) any list of Stauffer locations in AMICO's possession;

6. All communications between and among AMICO (including inside and outside counsel) and representatives of Montrose's other primary insurers relating to the "named insured" issue, including communications relating to the carriers' allegation that Montrose is a "sham" corporation or an alter ego of Stauffer or its successors.

Montrose has established a *prima facie* showing that AMICO knew that Montrose was a named insured and has further shown that AMICO committed fraud in contending otherwise.

The *prima facie* showing is based on the following offered evidence by Montrose.

1. AMICO agreed to duplicate coverage provided by prior insurance carriers.

2. Prior insurers covered Montrose as a Stauffer related company under its general liability insurance this being conceded by AMICO.

3. AMICO policies defined "named insured" as Stauffer Chemical Company at all locations of the insured. This included owned or controlled subsidiaries or affiliate companies or corporations now existing or hereinafter created.

4. AMICO covered Montrose's automobiles under the Stauffer coverage.

5. AMICO inspected Montrose facilities under Stauffer's policies.

6. Mr. John Noe of AMICO concluded after his review that Montrose was covered under the AMICO policies' named insured provision under the Stauffer policies.

7. AMICO's own documents refer to Montrose Chemical as a named insured.

8. AMICO's premium calculations used Montrose loss, payroll, sales and automobile data in determining Stauffer's premiums.

9. Montrose was not a "specific joint venture" excluded under the policies.

10. AMICO established substantial reserves on the Montrose claims.

11. AMICO provided documents to Montrose through its counsel that contradicted evidence in its files.

12. AMICO failed to disclose favorable coverage information to its insured.

13. A substantial number of documents have been identified during depositions and other forms of discovery but have not been provided by AMICO.

The ultimate determination of the above evidence offered by Montrose will be for the jury to decide. However, for purposes of discovery motions the Court can conclude that there are strong reasonable inferences of the above as being factual so as to constitute waiver of the attorney-client privilege.

IT IS THEREFORE ORDERED:

1. Unless this Order is stayed by appeal as provided herein, within forty days of entry of this Order, AMICO shall

produce to the Court for *in camera* inspection all documents in its possession (regardless of the office, department or branch where it is maintained, *e.g.*, Special Risk Underwriting, National Account Claim, Risk Experience, audit, accounting, NATLSCO, Environmental Claims Unit Central Claims Office, or Home Office) (including those in its counsel's possession) in any way relating to the "named insured" issue, including those documents in the categories listed in No. 1 through No. 6 at pages 1-2 above.

2. At the time of the *in camera* submission, AMICO shall simultaneously produce to Montrose a log of all documents submitted for *in camera* review, listing the documents by type, date, author, recipient, copied parties, and specific subject matter.

3. To the extent that AMICO does not assert a privilege as to documents within the scope of this Order, they shall be produced directly to Montrose within forty days of entry of this Order.

4. This Order will be stayed if AMICO petitions for appellate review within forty days of entry of this Order. Such stay shall remain in effect until AMICO exhausts appellate writ review. At that point, the time limits in this Order shall become effective, commencing to run from the date of the final Order.

DATED: December 11, 1998 JOSEPH R. KALIN, JUDGE

The Honorable Joseph R. Kalin
Los Angeles County Superior Court

Presented by:

LATHAM & WATKINS

By: Kristine L. Wilkes

Kristine L. Wilkes
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Attorneys for Plaintiff
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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

MONTROSE CHEMICAL CORPORATON OF CALIFORNIA,	CASE NO. BC 130486
	CENTRAL CIVIL, WEST
	ORDER DENYING
Plaintiff,	AMERICAN MOTORISTS
	INSURANCE COMPANY'S
v.	MOTION TO STAY
	ENFORCEMENT OF THE
AMERICAN MOTORISTS INSURANCE COMPANY, et al.,	COURT'S DECEMBER 11, 1998
	ORDER GRANTING
	MONTROSE CHEMICAL
	CORPORATION OF
Defendant.	CALIFORNIA'S MOTION TO
	COMPEL UNDER FRAUD
	EXCEPTION TO
	ATTORNEY-CLIENT
	PRIVILEGE
AND RELATED CROSS ACTION.	
	ACTION FILED: JUNE 27, 1995
	DISCOVERY CUT-OFF: DECEMBER 15, 1998
	MOTION CUT-OFF: NONE
	TRIAL DATE: MARCH 16, 1999

The motion of American Motorist Insurance Company to Stay Exforcement of the Court's December 11, 1998 Order Granting Montrose Chemical Corporation of California Motion to Compel Under Fraud Exception to Attorney-Client Privilege came on for hearing on January 13, 1999 in Department 316 of the above-entitled court. Montrose was represented by Kristine L. Wilkes and Desiree I. Kellogg, of Latham & Watkins. AMICO was represented by Henry C. Truszkowski of Hewitt & Prout After consideration of the

submitted papers, the declarations and exhibits of the parties, the oral arguments of counsel, and good cause shown:

IT IS HEREBY ORDERED that AMICO's motion is DENIED in full.

DATED: January 15, 1999

/s/ JOSEPH R. KALIN, JUDGE

The Honorable Joseph Kalin
Los Angeles County Superior Court

Presented by

LATHAM & WATKINS

By: /s/ Kristine L. Wilkes

Kristine L. Wilkes
Attorneys for Plaintiff
Montrose Chemical Corporation of California

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NO. 55 HON. JOSEPH R. KALIN, JUDGE

MONTROSE CHEMICAL CORPORATION, *Plaintiff,*	
vs.	No. BC 130486
AMERICAN MOTORISTS INSURANCE COMPANY, et al., *Defendants.*	
MONTROSE CHEMICAL CORPORATION, *Plaintiff,*	
vs.	No. BC 077158
TRAVELERS INSURANCE COMPANY, et al., *Defendant.*	

TRANSCRIPT OF PROCEEDINGS

November 24, 1998
See Appearances on Following Page)
(Videotape Recording)

Court Transcriber For Videotape Recording System: ELEANOR R. HALL TRANSCRIBING
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Bakersfield, California 93304
Telephone: (805) 322-8337

your Honor is not in the court.

MS. WILKES: Maybe the answer, your Honor, is for the parties to meet and confer and try to put something in the order we agree on and if not, then —

THE COURT: Come in ex parte and we'll make an order on it.

MS. WILKES: All right. Thank you, your Honor.

THE COURT: Thank you.

MS. KENNEDY: And just another clarification is and you, your Honor, are planning on reviewing these?

THE COURT: In camera, yes.

MS. KENNEDY: In camera. I know that you're —

THE COURT: Because I am concerned about, you know, if one attorney says to the other attorney, not on specific documents or something, we're going to do this or do that type of a situation.

MS. KENNEDY: And that's why I said you do — you are still granting us a privilege on trial strategy, your, Honor?

THE COURT: Oh, yes. Yes. Trial strategy. I'm saying trial strategy is as long as it's not in terms of — you know, obviously what Montrose is looking for here is certain types of documents and trial strategy is not — they're not entitled to.

MS. KENNEDY: Right. And then — I'm just clarifying that you, as opposed to Judge Rudolf —

THE COURT: Yes, I —

MS. KENNEDY: — are reviewing these because some of these documents may also fall into the proposed order that has been submitted asking certain documents be submitted to Judge Rudolf, so another thing we may have to deal with is how those proposed orders interact.

THE COURT: Well, this order is independent of itself. If there are some things that Judge Rudolf was looking at, I'm going to be looking at it now. I don't want to turn this over to Judge Rudolf or anybody else at this point in time because we're getting too close to the trial date and it's a jury trial and the jury is going to decide all of the factual issues.

MS. KENNEDY: And just — as another matter of clarifying so when we work out this proposed order with them I have all the information, to the extent that materials have

been previously produced to your Honor in camera, is there any reason to reproduce them?

THE COURT: Yes, because I don't — I've looked at them before and I ruled on them in a different light. Now they become — they may or may not be relevant to this order at this point. Okay?

(Attorneys thank the court; the proceedings were concluded for this date)

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NO. 55 HON. JOSEPH R. KALIN, JUDGE

MONTROSE CHEMICAL CORPORATION, *Plaintiff,*	:	
vs.	:	No. BC 130486
AMERICAN MOTORISTS INSURANCE COMPANY, et al., *Defendants.*	:	

TRANSCRIPT OF PROCEEDINGS
December 15, 1998

APPEARANCES:

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Court Transcriber
For Videotape
Recording System:

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MR. MacPHERSON: Your Honor, that's unworkable. Your Honor, we need a definitive ruling now. I can't call up the client and say "We need to prepare for trial and I just need you to know that there's an order currently outstanding saying that whatever we say is producible to the court. Now, we can go in and assert that that order shouldn't be enforced but I can't talk to you with the confidence that the attorney-client privilege provides." Your Honor, that's an unworkable solution.

MR. TAYLOR: One observation, your Honor.

THE COURT: Yes.

MR. TAYLOR: Aside from AMICO's trial prep in this case, the fraud and the named insured issue is continuing in Canadian II and Canadian III where they're appealing your Honor's order ordering them to defend those cases and appealing your Honor's named insured order in those cases. So aside from the trial prep we have, I think —

THE COURT: Yes. See, that's another issue now. I mean, if — that's the continuing bad faith that Montrose is alleging, that years ago you should have followed the court orders, whatever they were at that time and the duty to defend it, so any appeals on those issues right now would be something that would be producible but not necessarily the attorney — what the attorneys — we've got whole new issues arising here.

MR. MacPHERSON: Your Honor, the order should be limited to the date the motion was filed, your Honor. Our client has a right to appeal to the advice of counsel and the appeals. Your Honor, I vociferously disagree with you that your Honor's order should encompass the advice of counsel given in the appeals in Canadian II and Canadian III.

MS. GREGORSKI: I think there's a distinction we need to draw, your Honor, between maybe trial preparation and the bad faith case —

THE COURT: Yes.

MS. GREGORSKI: — which your Honor is indicating is protected and is not something that something be submitted in camera; versus the ongoing fraud — or the ongoing fraud in the Canadian I, Canadian II or Canadian III matters, which is Montrose alleging continuing and which is Montrose as asserted in the papers which your Honor has granted continuing. So there's a distinction there. So if we put a time limit on it and say I'd put the date that Montrose filed the motion, we're eliminating — we're eliminating not only the bad faith but the trial preparation, perhaps those materials, but we're also eliminating perhaps documents that were submitted or attorney-client communications a week after in the Canadian II or Canadian III underlying also the fraud.

MR. MacPHERSON: Your Honor, AMICO has — I'm sorry, were you finished?

MS. GREGORSKI: Sorry. But again, your Honor, I think the point to focus on is that the order has been signed and should go forward and the appeals process should run and presumably AMICO is not going to be — is going to, you know, appeal the decision in 40 days and we'll have to go through the Court of Appeals and at the time they're presenting documents to your Honor, if there are outstanding issues that — you know, trial preparation we could address those at that time.

THE COURT: I don't intend to have discovery of trial preparation but I would agree that if Montrose is alleging ongoing bad faith that — I'm not cutting that issue off under any circumstances, counsel. So I'm going to leave the order the way it is.

MS. GREGORSKI: Thank you, your Honor.

MR. MacPHERSON: Your Honor, we have some additional substantive problems with the order. For example —

MS. GREGORSKI: I believe your Honor has already reviewed any objections that were filed.

MR. MacPHERSON: Well, your Honor hadn't reviewed our counter-proposed order which tracks precisely your rulings, your Honor and —

MS. GREGORSKI: Oh, that track —

MR. MacPHERSON: — and your minute order, but, your Honor, for example, Montrose's order is so overbroad and so far extends beyond what your Honor ruled. For example it's not limited to attorney-client communications which you expressly ruled was the only thing subject to the attorney-client fraud, but it orders, for example, the production of all communications among counsel, when a client's not present, does it refer to a client?

Your Honor, that once again is unworkable. I mean, if I want to talk to a colleague at the office about the named insured issue, do I need to conference call your Honor in so you can participate in camera in this communication between counsel?

This order is unworkable in so many ways.

THE COURT: Counsel, if you have a communication, an oral communication with another counsel, how is the court in any way going to get to that? I'm talking about documents; I'm talking about things that go back and forth, that type of situation.

MR. MacPHERSON: So this order is limited to documents, for example? They cannot now depose AMICO's counsel about communications among all counsel which they had?

MS. GREGORSKI: Again, your Honor, the order specifically laid all this out and what AMICO is trying to do is come in here and try to usurp with Ms. Wilkes in absence —

THE COURT: Yes.

MS. GREGORSKI: — and try to usurp specific parts of the order that, you know, were briefed or argued during the motion.

THE COURT: Counsel, again we're dealing with a situation. If there's going to be a deposition of a counsel, that will have to be dealt with at that time because you're indicating counsel are talking about something in an informal matter in the office as opposed to what if you had a meeting between counsel and there was definite strategy planned but it wasn't reduced to writing.

MR. MacPHERSON: Your Honor, their order — we're not in here because we're trying to make problems, your Honor. We're in here because their order is so broad and so

vague that these are the type of arguments that they can propound in the future, your Honor, and we need a definitive order that establishes the parameters of the attorney-client relationship; what privileged communications we can have with our client; what privileged communications counsel can have among themselves. Your Honor, and it's not addressed in their order, and that's the reason that we're in here seeking clarification of the order.

THE COURT: Well, the order was intended to be broad so I think you're going to have to – if you refuse to turn something over or refuse to have a deposition then it's going to have to be dealt with on a motion to compel.

MS. GREGORSKI: A motion for protective order, a motion to quash.

MR. MacPHERSON: So your Honor is stating that we have no assurances that any type of privileges can apply going forward to a communications among counsel. Is that the statement of your Honor?

THE COURT: Counsel, you've got two different issues. You've got an issue of trial preparation and you've got an issue of bad faith, so you still have, as far as trial preparation it's going to be privileged. As far as making decisions with regard to where AMICO is going to go on the duty to defend that still goes to the bad faith as an ongoing type of a situation.

MR. MacPHERSON: Your Honor, AMICO is defending Montrose in all these actions. That's really not an issue anymore.

THE COURT: But it's being appealed. Isn't that what counsel just said?

MR. MacPHERSON: We have taken appeals in Canadian II and III.

MS. GREGORSKI: Yes.

THE COURT: So isn't the continuation of the appeal a possible issue of bad faith?

MR. MacPHERSON: Your Honor, AMICO has the right to assert its – its legal arguments while it's paying Montrose's defense costs under a full reservation of rights, your Honor.

There's nothing improper about that and there's nothing in bad faith about that. There's nothing in that to vitiate the attorney-client privilege.

MR. TAYLOR: Your Honor, taking unreasonable litigation positions and causing unreasonable litigation is bad faith and they have a right to an appeal, and they have a right to make what arguments they want but they do so at their own peril. So that's part of what a carrier has to do is make the decision whether to take unreasonable litigation positions at the risk of bad faith or not.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES
Date 10/28/97 **DEPT.55**

HONORABLE	**Joseph R. Kalin** JUDGE	**E T ESPINOZA**	DEPUTY CLERK	
HONORABLE	JUDGE PRO TEM	ELECTRONIC RECORDING MONITOR		
BC005158	**A ALBA, CSL**	Deputy Sheriff	**NONE**	Reporter
		Plaintiff Counsel		
MONTROSE CHEMICAL CORP OF CALIF VS CANADIAN UNIVERSAL INSUR CO INC ET AL		Defendant Counsel	**NO APPEARANCES**	

***r/t* BC046677, BC077158, BC13048**
C594148 & C/W C597389

NATURE OF PROCEEDINGS:

RULING ON SUBMITTED MATTER

The Court having taken Motion of Plaintiff and Cross-Defendant Montrose Chemical Corporation of California for Summary Adjudication against American Motorists Insurance Company under submission on October 22, 1997, now rules as follows:

Combined Motion in cases BC005158 (Canadian II) and BC077158 (Canadian III) is GRANTED establishing as a matter of law that Montrose Chemical Corporation is a named insured under American Motorist Insurance Company policies 9ZM555300, OZM555300 and IZM555300 for the period of January 1969 through March 1, 1971.

Plaintiff, Montrose has met its burden of proof which has not been controverted by material issues of fact by defendant AMICO. Defendant AMICO has raised some disputed issues of fact, however, those issues of fact are not material and are irrelevant.

Based upon the extensive material presented to the Court which stood in excess of three feet high and consisting of declarations, depositions, deposition testimony, prior court proceedings and prior appellate and trial court proceedings from various courts, this court finds that there is no ambiguity in the policy language, observing reasonable interpretation of the policy, considering admissions by defendant's personnel, the plain meaning of the insured definition and the overwhelming extrinsic evidence defendant has failed to raise any material issue of fact for jury consideration.

The Court finds Montrose as a named insured as a matter of law.

Defendant AMICO has raised the issue that the Court cannot consider Montrose's Motion for Summary Adjudication as being prohibited by Section 1008 Code of Civil Procedure.

Case BC005158 (Canadian II) heard by the California Supreme Court establish AMICO's Duty to Defend Montrose regarding the underlying toxic contamination tort cases. However, the Supreme Court did not rule on the issue of "named insured" thus returning that issue to the trial court.

In case BC077158 (Canadian III) the Court of Appeals reversed the trial court on the issue of "named insured" on the basis the trial court did not have before it the necessary evidence to decide the issue and based upon the trial court accepting the Montrose's theory of collateral estoppal. The matter was remanded to the trial court on the issue of "named insured".

This court's interpretation of the Appellate and Supreme Court decisions is that the trial court should upon remand reconsider the "named insured" issue upon being presented with all the necessary material with which to make such a decision. By way of the present Summary Adjudication Motion before it, this court is now able to reach such a decision.

The interests of justice and judicial economy support consideration of these motions. These cases now encompass over 70 Court volumes accumulated over several years as a result of innumerable hearings. A recent discovery motion in one of the related Montrose cases being handled by this court addressed documents for productions which if stacked on top of each other would reach the height of a 17 story office building.

Aspects of these cases have on more than one occasion been before the Appellate and Supreme Court of this State. By ruling on these motions the "named insured" issue can be resolved (subject to the appellate process which has been indicated by the parties) and the court can move on to resolve

other issues in these cases and set a realistic trial date for final resolution of these lenghty, complicated cases.

A true copy of this minute order is sent to counsel via U.S. Mail this date as follows:

Barry J. Shots
Latham & Watkins
701 "B" Street, Ste 2100
San Diego, CA 92101

John Chesney
Drinker, Biddle & Reath
1345 Chestnut Street
Philadelphia, PA 19107-3496

Henry C. Truszkowski
Hewitt & Prout
4605 Lankershim Blvd, Ste 540
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11075 Santa Monica Blvd, 3rd Floor
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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

AMERICAN MOTORISTS INSURANCE COMPANY, *Petitioner,*	:	B100029 (Super. Ct. No. BC077158)
v.	:	(Joseph R. Kalin, Judge)
THE SUPERIOR COURT, *Respondent.*	:	
MONTROSE CHEMICAL CORPORATION OF CALIFORNIA, *Real Party in Interest.*	:	

ORIGINAL PROCEEDING; petition for writ of mandate. Writ granted with directions.

Hewitt & Prout, Erica S. Arouesty, Daniel A. Rozansky, Stephen L. Hewitt; Drinker, Biddle & Reath, John Chesney, Michael F. Brown, and Jeanine M. Kasulis for Petitioner.

No appearance for Respondent.

Latham & Watkins, David L. Mulliken, Barry J. Shotts, Whitney E. Peterson and William C. Tayler for Real Party in Interest.

American Motorists Insurance Company ("AMICO") seeks extraordinary writ review of an order which summarily adjudicated the issue of AMICO's duty to defend Montrose Chemical Corporation of California in one of three underlying

tort actions. In the order, the superior court determined that Montrose was a named insured under several AMICO policies that had been issued to Stauffer Chemical Company, a 50 percent owner of Montrose during the relevant periods. In the same order, the court also denied AMICO's motion for summary adjudication on the issue of whether the damages allegedly sustained by the plaintiffs in the underlying action had occurred outside its policy periods. The court directed AMICO to pay Montrose's defense costs in the underlying Alderman action (Raymond Alderman, et al. v. Cadillac/Fairview California, Inc., et al. (Super. Ct. L.A. County, BC 069093)), and AMICO petitioned for review. We issued an alternative writ and set the matter for oral argument.

This proceeding resurrects issues that originated in a prior appeal between the parties decided by this Division in 1993. (*Montrose Chemical Corp. v. American Motorists Ins. Co.* (Jan. 25, 1993, B058060) (hereinafter, *"Canadian Universal I"*).)[1] Montrose contends we should dismiss the instant petition because AMICO possesses an adequate remedy by appeal, as discussed in *Canadian Universal I.* Montrose defends the trial court's findings that our prior decision in *Canadian Universal I* has collaterally estopped AMICO from relitigating the named insured defense against Montrose in this action, and that Montrose is a named insured as a matter of law. AMICO challenges those findings as well as the denial of its summary adjudication motion on whether the damages sustained by the Alderman plaintiffs had occurred outside its policy periods.[2]

MONTROSE'S MOTION

The portion of the order under review that partially granted Montrose's alternative motion for summary adjudica-

1. The California Supreme Court initially granted review on April 29, 1993, (S031548), but dismissed and remanded the matter to this Court on February 10, 1994 (S031548). We then issued our remittitur.

2. With its return to the alternative writ, Montrose filed 42 bound volumes of exhibits, many of which concerned *Canadian Universal I.* AMICO moved to strike 27 volumes of Montrose's exhibits. We deny the motion to strike.

tion of issues left undecided whether AMICO owes a duty to defend Montrose in two other underlying actions. Following the well-established rule that summary adjudication orders are not appealable if they leave other issues between the parties undecided, we reject Montrose's assertion that the order is appealable. (*Field Research Corp. v. Superior Court* (1969) 71 Cal.2d 110, 111.)

Although we entertained AMICO's prior appeal in *Canadian Universal I* from an order directing the payment of defense costs when coverage issues remained to be adjudicated, that does not mean the instant order is appealable or that our prior decision has collaterally estopped AMICO from relitigating the named insured defense against Montrose. *Canadian Universal I* arose in a different procedural posture and the issue of the named insured defense was not before us.

In *Canadian Universal I*, Montrose alleged that AMICO was required to defend *and* indemnify Montrose in the Stringfellow[3] and Levin Metals[4] cases. (Montrose does not allege in the present complaint that AMICO must indemnify Montrose in the three underlying cases.) Judge Wisot, the trial judge in *Canadian Universal I,* found by means of summary adjudication of issues, that Montrose was AMICO's named insured under the same policies at issue herein, and that AMICO owed Montrose a defense in the Stringfellow and Levin Metals cases. With regard to establishing the existence of an immediate duty to defend in *Canadian Universal I,* nothing further remained to be litigated. Only the coverage issues were undecided when AMICO unilaterally refused to pay Montrose's defense costs in the Levin Metals cases, contrary to the spirit of Judge Wisot's summary adjudication orders.

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3. *United States of America, et al. v. J. B. Stringfellow, Jr., et al.* (Civ. No. 83-2501 (HLH) C.D. Cal., and Newman, et al. v. J. B. Stringfellow, Jr., et al. (Super. Ct. Riverside County, No. 165994MF).

4. *Parr-Richmond Terminal Co., et al. v. Levin Metals Corp., et al.* (No. C 85-4776 SC, N.D. Cal.), *Levin Metals Corp., et al. v. Parr-Richmond Terminal Co., et al.* (Nos. C 84-6273 SC and 84-6324 SC, N.D. Cal.) and Levin Metals Corp. v. Parr-Richmond Terminal Co. et al. (Super. Ct. Contra Costa County, No. 255836).

When Judge Wisot entered an equitable order of enforcement requiring the immediate payment of Montrose's defense costs, AMICO appealed from that order, but in an incongruous manner. On the one hand, AMICO asserted that Judge Wisot's order was not a final judgment because coverage issues remained to be litigated. On the other hand, AMICO did not petition for extraordinary writ relief on the ground that there was no final judgment, as it did in this case.

Relying on the collateral order exception to the one final judgment rule, we severed the order to pay from the independent and remaining coverage issues in *Canadian Universal I.* By affirming the order to pay without reviewing Judge Wisot's summary adjudication ruling that Montrose was a named insured, an issue neither raised by AMICO in its appellate briefs nor mentioned in our opinion in *Canadian Universal I,* we did not review the merits of the named insured finding. Our opinion in *Canadian Universal I,* which enforced an immediate duty to defend order, was not a final judgment on the merits that barred AMICO from relitigating the named insured issue in this action.[5] *Canadian Universal I* resolved the questions of whether Judge Wisot possessed the equitable power to enforce the duty to defend orders, and whether the procedure he used was appropriate. With regard to AMICO we did not rule on anything else.

"The doctrines of res judicata and collateral estoppel apply only when a final judgment on the merits has been rendered. [Citations.] When, as here, ajudgment is still open to direct attack by appeal or otherwise, it is not final and the doctrines of res judicata, and collateral estoppel do not apply." (*National Union Fire Ins. Co. v. Stiles Professionol Low Corp.* (1991) 235 Cal.App.3d 1718, 1726.) In *Canadian Universal I,* at

5. Montrose, however, quoted the following sentence from our prior opinion in *Canadian Universal I* as evidence of collateral estoppel: "'We conclude, however, that the summary adjudication orders were not final for the purpose of appeal *until they were incorporated in the subsequent final order to pay defense costs.*' [Emphasis added.]" We did not intend by that sentence to preclude AMICO from relitigating the named insured issue against Montrose in other actions, prior to the entry of a final judgment on the coverage issues in *Canadian Universal I.*

most we implicitly assumed that Montrose was a named insured for the purposes of enforcing Judge Wisot's orders finding an immediate duty to defend. But an insurer may subsequently be relieved of such duty when it shows "that there is *no* potential for coverage[.]" (*Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 295.)

In any event, the severance procedure we utilized in *Canadian Universal I* is no longer permissible due to a subsequent change in the law. In May 1994, the California Supreme Court decided *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725. *Morehart* disapproved several intermediate appellate opinions which, like *Canadian Universal I,* had held that the one final judgment rule did not bar an appeal from a judgment in a properly severed portion of a case. *Morehart* held that "an appeal cannot be taken from a judgment that fails to complete the disposition of all of the causes of action between the parties even if the causes of action disposed of by the judgment have been ordered to be tried separately, or may be characterized as 'separate and independent' from those remaining." (*Id.* at p. 743.) Our exercise of appellate jurisdiction in *Canadian Universal I* does not withstand scrutiny in light of *Morehort,* which we must follow. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450,455.)

The trial court's alternative finding that Montrose was a named insured as a matter of law is not supported by the record. The evidence Montrose presented below concerned its collateral estoppel theory and consisted of Judge Wisot's rulings and our prior opinion in *Canadian Universal I.* Montrose did not supply the court below with the exhibits that Judge Wisot had examined in rejecting the named insured defense in *Canadian Universal I.* In the absence of those exhibits or other evidence, the court below erred in deciding, as a matter of law, that Montrose was a named insured. (*Montrose Chemical Corp. v. Superior Court, supra,* 6 Cal.4th at p. 294, fn. 3.)

We conclude Montrose's motion for summary adjudication of AMICO's duty to defend was erroneously granted in the face of a triable issue of material fact regarding Montrose's status as a named insured.

DENIAL OF AMICO'S MOTION

AMICO joined in the motion of codefendant Insurance Company of North America to establish by summary adjudication that the damages sought by the Alderman plaintiffs were sustained long after the periods covered by their respective policies. The trial court denied their motion and AMICO seeks extraordinary writ review of that denial.

The complaint in Alderman alleged that hazardous chemicals had escaped from Montrose's Torrance facility during its operation from 1947 to 1982, and had migrated onto the plaintiffs' properties, injuring their health and property values. The Alderman plaintiffs allegedly discovered the migration of the hazardous chemicals within three years of the filing of their complaint.

AMICO reads these allegations to mean that the alleged damages occurred within three years of the filing of the complaint, which would have been well beyond the periods covered by the AMICO policies issued to Stauffer. We read the complaint, however, as alleging that environmental contamination occurred during Montrose's years of operation of its facility, not merely during the three years prior to the filing of the complaint. This allegation was sufficient to establish a potential for coverage under *Montrose Chemical Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645.

We conclude AMICO's motion for summary adjudication was properly denied due to the existence of triable issues of material fact.

DISPOSITION

Let a peremptory writ issue, commanding respondent superior court to vacate the portions of its order of November 30, 1995, granting the motion for summary adjudication on Issue 3 against AMICO and ordering AMICO to pay Montrose's defense costs, in Los Angeles Superior Court case No. BC077158, entitled Montrose Chemical Corp. v. The Travelers Indemnity Co., et al., and enter a new and different order, denying same. In all other respects the petition for writ of mandate is denied. Each party is to bear its own costs.

NOT TO BE PUBLISHED.

ORTEGA, J.

We concur:

SPENCER, P.J.

VOGEL (Miriam A.), J.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

MONTROSE CHEMICAL CORPORATION OF CALIFORNIA, a corporation, *Plaintiff,* *v.* THE TRAVELERS INDEMNITY COMPANY, a corporation; CANADIAN UNIVERSAL INSURANCE COMPANY, INC., a corporation; AMERICAN MOTORISTS INSURANCE COMPANY, a corporation; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA. a corporation; INSURANCE COMPANY OF NORTH AMERICA, a corporation: CENTAUR INSURANCE COMPANY, a corporation; ADMIRAL INSURANCE COMPANY, a corporation; AMERICAN CENTENNIAL INSURANCE COMPANY, a corporation; and DOES I through 500.inclusivc, *Defendants.* AND RELATED CROSS-ACTIONS.	Case No. BC077158 ORDER GRANTING PLAINTIFF MONTROSE CHEMICAL CORPORATION OF CALIFORNIA'S MOTION FOR SUMMARY ADJUDICATION AGAINST ALL PRIMARY CGL CARRIERS (ALDERMAN)

The motion of plaintiff and cross-defendant Montrose Chemical Corporation of California ("Montrose") for Summary Judgment, or, in the alternative, for Summary Adjudication ("Montrose's Motion") against defendants Insurance Company of North America, American Motorists Insurance Company, The Travelers Indemnity Company. National Union Fire Insurance Company of Pittsburgh, Pennsylvania, Canadian Universal Insurance Company, Inc. and Admiral Insurance Company (collectively, the "Carriers") came on regularly for hearing on May 18, 1994 in Department 55 of this Court, the Honorable Joseph Kalin, Judge, presiding.

After full consideration of the evidence and points and authorities submitted by all parties, and the oral argument of counsel, the Court hereby finds that Montrose has shown by admissible evidence and reasonable inferences therefrom not contradicted by other evidence or inferences, and by matters judicially noticed by this Court, that the Carriers have no defense to Montrose's first, second, third and fourth causes of action in Montrose's Second Amended Complaint, and there being no triable issue as to any material fact, the following issues are without substantial controversy:

Issue 1 (against defendant Admiral Insurance Company):

Plaintiff Montrose Chemical Corporation of California is entitled to a summary adjudication in its favor as to the first, second, third and fourth causes of action in its Second Amended Complaint — except as to Admiral Insurance Company's 1985 Policy Number A85EG 2658 — because, as a matter of undisputed material fact and as a matter of law, defendant Admiral Insurance Company has a past, present and continuing duty to defend Montrose in *C. Raymond Alderman. et at. v. Cadillac Fairview/California, Inc., et al.,* Case No. BC062039 (Los Angeles County Superior Court). (*See* Plaintiff's Separate Statement of Undisputed Material Facts. ¶¶ 1-2. 32-43).

Issue 2 (against defendant Insurance Company of North America):

Plaintiff Montrose Chemical Corporation of California is entitled to a summary adjudication in its favor as to

the first, second, third and fourth causes of action in its Second Amended Complaint because, as a matter of undisputed material fact and as a matter of law, defendant Insurance Company of North America has a past, present and continuing duty to defend Montrose in *C. Raymond Alderman, et al. v. Cadillac Fairview/California, Inc., et al.*, Case No. BC062039 (Los Angeles County Superior Court). (*See* Plaintiff's Separate Statement of Undisputed Material Facts, Facts ¶¶ 3-4, 32-43).

Issue 3 (against defendant American Motorists Insurance Company

Plaintiff Montrose Chemical Corporation of California is entitled to a summary adjudication in its favor as to the first, second, third and fourth causes of action in its Second Amended Complaint because, as a matter of undisputed material fact and as a matter of law, defendant American Motorists Insurance Company ("AMICO") has a past, present and continuing duty to defend Montrose in *C. Raymond Alderman, et al. v. Cadillac Fairview/California, Inc., et al.*, Case No. BC062039 (Los Angeles County Superior Court). (*See* Plaintiff's Separate Statement of Undisputed Material Facts, ¶¶ 11-12, 32-43). In so doing, the court considered and rejected AMICO's argument that Montrose is not a named insured, instead ruling that AMICO is collaterally estopped from relitigating the named insured issue and, alternatively, that Montrose is a named insured under AMICO's policies as a matter of law.

Issue 4 (against defendant The Travelers Indemnity Company):

Plaintiff Montrose Chemical Corporation of California is entitled to a summary adjudication in its favor as to the first, second, third and fourth causes of action in its Second Amended Complaint because, as a matter of undisputed material fact and as a matter of law, defendant The Travelers Indemnity Company has a past, present and continuing duty to defend Montrose in *C. Raymond*

Alderman, et al. v. Cadillac Fairview/California, Inc., et al., Case No. BC062039 (Los Angeles County Superior Court). (*See* Plaintiff's Separate Statement of Undisputed Material Facts. ¶¶ 5-6, 32-43).

Issue 5 (against defendant National Union Fire Insurance Company of Pittsburgh, Pennsylvania:

Plaintiff Montrose Chemical Corporation of California is entitled to a summary adjudication in its favor as to the first, second, third and fourth causes of action in its Second Amended Complaint because, as a matter of undisputed material fact and as a matter of law, defendant National Union Fire Insurance Company of Pittsburgh. Pennsylvania has a past, present and continuing duty to defend Montrose in *C. Raymond Alderman, et al. v. Cadillac Fairview/California, Inc., et al.*, Case No. BC062039 (Los Angeles County Superior Court). (*See* Plaintiff's Separate Statement of Undisputed Material Facts, ¶¶ 7-8, 32-43).

Issue 6 (against defendant Canadian Universal Insurance Company, Inc.):

Plaintiff Montrose Chemical Corporation of California is entitled to a summary adjudication in its favor as to the first, second, third and fourth causes of action in its Second Amended Complaint because, as a matter of undisputed material fact and as a matter of law, defendant Canadian Universal Insurance Company, Inc. has a past, present and continuing duty to defend Montrose in *C. Raymond Alderman, et al. v. Cadillac Fairview/California, Inc., et al.*, Case No. BC062039 (Los Angeles County Superior Court). (*See* Plaintiff's Separate Statement of Undisputed Material Facts, ¶¶ 9-10, 32-43).

IT IS THEREFORE ORDERED that Montrose's first, second, third and fourth causes of action, and the Carriers' past, present and continuing duty to defend, shall be deemed established in favor of Montrose and against the Carriers pursuant to the foregoing issues, and that no further evidence or

proof thereof shall be required in this action, and that the final judgment herein shall be based upon the matters so established.

IT IS FURTHER ORDERED that Montrose is entitled to such further relief as a matter of undisputed fact (*see* Plaintiff's Separate Statement of Undisputed Material Facts, ¶¶ 1-12, 32-43), and as a matter of law, as follows:

1. The Carriers have a past, present and continuing duty to defend Montrose in *C. Raymond Alderman, et al. v. Cadillac Fairview/California, Inc., et al.*, Case No. BC062039 (Los Angeles County Superior Court) (the "*Alderman* Action").

2. Subject to paragraph 5 of this Order, each Carrier is and shall be separately and independently liable for the entire amount of Montrose's reasonable attorneys' fees and costs, and any potential disagreement among the Carriers or some of them regarding allocation of Montrose's defense costs shall not relieve the Carriers, or any of them, from the obligation to pay all of Montrose's defense costs when due. No allocation of defense costs shall be made to Montrose.

3. The Carriers, and each of them, are ordered to reimburse Montrose for all past reasonable attorneys' fees and costs (including interest accrued at the legal rate) incurred as of July 1994 by Montrose in defense of the *Alderman* Action. Montrose already has provided to the Court specific invoices and/or billing statements setting forth the reasonable attorneys' fees and costs incurred as of December 1993, and the Court already has determined such attorneys' fees and costs to be reasonable. In addition. Montrose already has provided to the Carriers by mail or otherwise specific invoices and/or billing statements setting forth the reasonable attorneys' fees and costs incurred as of July 1994. Within thirty days from the date of this Order, the Carriers, and each of them, shall provide payment to Montrose of the total amount set forth in these statements, including interest accrued at the legal rate, from the date of such statements.

4. Subject to paragraph 5 of this Order, the Carriers, and each of them, are ordered to specifically perform their duty to defend under their particular policies of insurance by paying Montrose for the full amount of all reasonable attorneys' fees

and costs incurred in the *Alderman* Action after July 1994. Montrose shall provide to the Carriers by mail (or otherwise) statements on a monthly basis setting forth the reasonable attorneys' fees and costs incurred by Montrose. Within thirty days of receipt of such statement, the Carriers, and each of them, shall provide payment to Montrose of the total amount set forth in the statements, subject to paragraph 5 of this Order. Interest shall accrued on any statement unpaid more than thirty days after the date of receipt by any Carrier at the rate of ten percent per annum until paid.

5. If any Carrier in good faith contends that part of a statement received after the date of this Order is not a reasonable defense cost, it must so notify counsel for Montrose within thirty days of receipt of the statement objected to. If Montrose and the objecting Carrier cannot resolve the dispute within the same thirty-day period, the objecting Carrier must file an objection with the Court within said period and the Carrier is relieved from paying the disputed portion of the statement until the Court or a referee has resolved the dispute. The existence of a dispute as to any particular item on a statement shall not relieve the Carriers from paying the undisputed amount of all other items on a statement within thirty days of receipt of the statement.

6. Nothing in this Order shall permit Montrose to receive or recover more than its actual attorneys' fees and costs. In the event Montrose receives or recovers duplicate payment for any particular attorneys' fees or costs, Montrose shall promptly notify all Carriers and shall remit the amount of the duplicate payment to the Carriers in proportion to their payments.

7. Nothing in this Order shall affect the rights of any Carrier to seek contribution or indemnity from any other Carrier.

IT IS FURTHER ORDERED that Admiral Insurance Company's ("Admiral") Cross-Motion for Summary Adjudication of Issues (Alderman) and Insurance Company of North America's ("INA") Motion For Summary Adjudication Of Issues [CCP 437c] are DENIED on the basis that the cross-motions did not present evidence that the *Alderman* Action cannot come within the policies' coverage by virtue of the

scope of the insuring clause or the breadth of an exclusion. *See* Plaintiff's Separate Statement of Disputed And Undisputed Material Facts In Opposition To Admiral's Cross-Motion For Summary Adjudication Of Issues (Alderman), ¶¶ 3-6; Plaintiff's Separate Statement of Disputed And Undisputed Material Facts In Opposition To Insurance Company of North America's Motion For Summary Adjudication Of Issues, ¶¶ 3, 7-11; Admiral's Separate Statement of Disputed And Undisputed Material Facts In Opposition To Montrose's Motion For Summary Judgment Or, In The Alternative, Summary Adjudication And In Support Of Admiral's Cross-Motion For Summary Adjudication Of Issues (Alderman); Separate Statement Of Undisputed Facts In Support Of Defendant INA's Motion For Summary Adjudication Of Issues.

IT IS SO ORDERED.

Dated November 30, 1995

Joseph Kalin

The Honorable Joseph Kalin
Judge, Los Angeles County
Superior Court

PREPARED BY:

Barry J. Shotts

Barry J. Shotts
of LATHAM & WATKINS
Attorneys for Plaintiff and Cross-Defendant
Montrose Chemical Corporation of California